LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 3 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964
No. 874

RALPH R. BENSON,

Petitioner,

vs.

STATE OF CALIFORNIA, PETER PITCHESS, Sheriff of Los Angeles County, Probation Officer of Los Angeles County,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RALPH R. BENSON,
6920 Sunset Boulevard,
Los Angeles, Calif. 90028,
Petitioner, Pro. Se.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	Page
Opinions of the courts below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions involved	3
Statement	4
The federal questions were properly raised and preserved	9
Reasons for granting the writ	10
Conclusion	14

INDEX TO APPENDICES

Appendix A. Opinion of the District Court of Appeal	1
Appendix B. Order Denying Petition for Writ of Habeas Corpus	21
Appendix C. Opinion of the United States Court of Appeals for the Ninth Circuit	26
Appendix D. Record References to Show Defense of Entrapment was raised at the trial	42

TABLE OF AUTHORITIES CITED

Cases	Page
Banks v. United States, 249 F. 2d 672	12
Carbo v. United States, 314 F. 2d 718	14
Cox v. Louisiana, 33 U.S. 4105	12, 13
Crisp v. United States, 262 F. 2d 68	12
Gouled v. United States, 255 U.S. 298	14
Hansford v. United States, 303 F. 2d 219	12, 13
Henderson v. United States, 237 F. 2d 169	12
Jackson v. Denno, 378 U.S. 368	2, 10
Jones v. United States, 362 U.S. 257	12
Lopez v. United States, 363 U.S. 427	14
Malloy v. Hogan, 378 U.S. 1	12,14
Mapp v. Ohio, 367 U.S. 643	14
On Lee v. United States, 343 U.S. 747	14
People v. Benson, 206 Cal. App. 2d 517	11
People v. Benson, 206 Cal. App. 2d 532	10
People v. West, 139 Cal. App. 2d Supp. 923	11
Raley v. Ohio, 360 U.S. 423	9, 12, 13
Ramirez v. United States, 294 F. 2d 277	11
Roden v. State, 209 Tenn. 202	12
Rodriguez v. United States, 227 F. 2d 912	11
Rogers v. Richmond, 365 U.S. 534	10
Sorrells v. United States, 287 U.S. 435	13
State v. Taylor, 375 S.W. 2d 58	12
Todisco v. United States, 298 F. 2d 208	14
Townsend v. Sain, 372 U.S. 293	2, 10
United States v. Di Donna, 276 F. 2d 956	11

Page

United States v. Healy, 202 Fed. 349 13
United States v. Sherman, 200 F. 2d 880 13
Voves v. United States, 249 Fed. 191 13
Wong Sun v. United States, 371 U.S. 471 .....6, 14

Statutes

United States Code, Title 28, Sec. 1254(1) 2
United States Code Title 28, Sec. 2241 2
United States Code, Title 28, Sec. 2253 2
United States Constitution, Fourth Amendment 3
United States Constitution, Fifth Amendment ... 3, 14
United States Constitution, Fourteenth Amendment 3, 10

Textbooks

California Practice Handbook No. 4, Sponsored by State Bar of Calif., pp. 146-149, 196-197 9
Witkin, California Crimes, pp. 169-170 11

IN THE

Supreme Court of the United States

October Term, 1964
No. .....

RALPH R. BENSON,

Petitioner,

vs.

STATE OF CALIFORNIA, PETER PITCHESS, Sheriff of Los Angeles County, Probation Officer of Los Angeles County,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit decided on September 24, 1964, with a petition for rehearing denied on November 5, 1964.

Opinions of the Courts Below.

No opinion was rendered by the state trial court.

The opinion of the District Court of Appeal of the State of California is reported at 206 Cal. App. 2d 519, 23 Cal. Reptr. 908, a copy thereof being annexed to this petition as Appendix A, p. 1.

The memorandum opinion of the United States District Court is unreported, and is annexed hereto as Appendix B, p. 21.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 336 F. 2d 791, and is annexed hereto as Appendix C, p. 26.

Jurisdiction.

After exhausting state remedies (206 Cal. App. 2d 519; cert. den. 374 U.S. 806) following his conviction in state court, petitioner applied to the United States District Court for a writ of habeas corpus under 28 U.S.C. Sec. 2241, which was by that court denied. A certificate of probable cause under 28 U.S.C. Sec. 2253 having been granted by the United States District Court, the United States Court of Appeals for the Ninth Circuit undertook petitioner's appeal to that court from denial of the writ. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented.

I.

Under *Townsend v. Sain* and *Jackson v. Denno*, has a state court reliably found the facts upon the defense of entrapment where the trial court renders a general verdict of guilt under state law which holds that the trial court does not consider the issue of entrapment at all unless the defendant has first admitted he is guilty of the offense charged, and where the defendant has refused to admit guilt?

II.

Consistent with due process, may a state rule the defense of entrapment not in issue in a criminal trial on

the basis that the defendant's position becomes untenable and inconsistent when he maintains his innocence and concurrently demands the benefit of the defense of entrapment?

III.

When state agents posed as petitioner's "clients" and made representations of, and consistent with, injury, was petitioner entrapped as a matter of law into filing false claims of injury on their behalf as their attorney?

IV.

When the state trial court received in evidence conversations beween petitioner and state agents who gained access to petitioners' office by fraud was petitioner denied due process?

Constitutional Provisions Involved.

1. The Fourth Amendment provides:

   "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the person or things to be seized."

2. The Fifth Amendment provides:

   "No person shall be compelled in any criminal case to be a witness against himself."

3. The Fourteenth Amendment provides:

   ". . . nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement.

This litigation concerns the activities of two state agents who, as decoys, conspired with two doctors to file false claims for non-existent injuries; falsely represented to petitioner that they were accident victims, but thereafter denied, at trial, that they had been injured as previously represented; retained petitioner to act as their attorney in connection with those claims without stating to petitioner that their claims were fraudulent; and placed in petitioner's hands the *very papers* upon which his prosecution was later premised without clearly informing him of the false nature thereof.

The District Court of Appeals held that petitioner was not entitled to assert the defense of entrapment since petitioner had failed to admit guilt to the offenses charged (App. A pp. 16-17). The Federal District Court held that this did not deny petitioner's due process rights (App. B p. 25), and the Ninth Circuit Court of Appeals held that the defense involved, merely, a "question of/California law" and that it had not been raised in the trial court (App. C pp. 39-40).[1] At the same time, this court also observed that the conduct of the law enforcement officers in this case was within the limits of permissible artifice and stratagem, basing its remark upon facts which only went to the issue of petitioner's guilt, since all reference to evidence showing entrapment was omitted from the opinion.

The facts by which petitioner seeks to defend himself under the defense of entrapment, *which facts have never*

[1]The defense of entrapment was raised. See Appendix D, p. 42.

been weighed by any California court, are as follows:

For the sole purpose of gaining entry to petitioner's law office two state agents retained petitioner as their attorney to represent them in connection with their respective "automobile collisions" [R. T. 487, 567; D.C.C.T. 50, 57].[2] Buchholz had actually been involved in a minor collision in which he was *not* injured. [He had, nevertheless, filed a false report with the State Department of Motor Vehicles, alleging injuries to his "neck and back" from said accident [R. T. 970]. Meng had never been involved in an automobile accident, and had not been hurt. Nevertheless, as the respondents now admit, Meng made the *"affirmative misrepresentation* (to petitioner) *of posing as a person who had been injured in an automobile accident, when, in fact, he had never been involved in an automobile accident."* (Resp. Br. 9th Cir., p. 29). (Emphasis added).

In addition to Meng's false representations of injury, his supervising investigator, Hawkins, telephoned petitioner, and represented that he had struck Meng's car and wanted to settle the case himself instead of letting it go against his insurance record. He also made other statements consistent with the injuries Meng purported to have [R. T. 651-4]. Meng later endorsed these false representations by claiming Hawkins had called *him too* (App. A pp. 9-10).

---

[2]R. T. refers to Reporter's Transcript at trial;

Rep. Supp. Tr. refers to the Reporter's Supplemental Transcript of trial proceedings;

C. T. refers to Clerk's Transcript of the trial court;

D.C.C.T. refers to the U.S. District Court clerk transcript.

Both Meng and Buchholz represented that they were under the care of Dr. Matloff, and that Dr. Matloff had taken x-rays [R. T. 487, 567]. Both represented that they had sustained property damages in their "accidents", and pictures of a damaged rear bumper on Meng's car were submitted to petitioner. [Cal. Ex. 4; R. T. 57, 124]. Both agents represented that they had sustained losses of earnings. [D.C.C.T. 52; App. A, p. 10]. These representations occurred before, during, and after their respective entries to petitioner's office.

Buchholz gained entry thereto under the pretext of seeing petitioner to borrow $100 against the recovery in his case. [R. T. 345-6]. He gave every physical manifestation of injury: he walked with a decided limp, had palsy, scoliosis, synosteosis of the spine, and was unable to move his right arm. [R. T. 46, 83, 363, 1028 1034]. In addition, he was incoherent. [R. T. 757].

Before visiting petitioner's office, Buchholz had never told petitioner that he had not been injured in his accident.[3] Petitioner's only knowledge of him was through the investigation file, which was indicative of the existence of injury. [R. T. 338-9, 636, 640; DC.C.T. 46, 47, 50]. While in petitioner's office Buchholz said, "You know, there is nothing wrong with

---

[3]There is no evidence supporting the conclusion of the Circuit Court of Appeals (App. C, p. 32) that at the time Buchholz visited petitioner's office petitioner knew Buchholz had not been injured. The probability of some injury had been suggested to petitioner by the investigation file. [R.T. 636]. Before his entry the other agent, Meng, had made a statement concerning lack of injury (App. A, p. 6) which the respondents have conceded was equivocal. (Resp. Br. D.C.A., pp. 49-150) *Cf. Wong Sun v. U.S.*, 371 U.S. 471, 483): "the officer never adequately dispelled the mi-impression engendered by his own ruse."

me. I don't want to get into any trouble."[4] On this visit he signed a medical lien form which authorized petitioner to pay Dr. Matloff directly out of Buchholz's settlement "for medical services rendered (him) by reason of this accident." [D.C.C.T. 51].

One month after Buchholz's visit to petitioner's office, petitioner received a written report in which Buchholz represented that his *"neck and back" were still "bothering" him;* and that he *claimed five days loss of earnings from the accident* [R. T. 858-860; D.C.C.T. 52]. Buchholz's employer *verified* this five day loss of earnings when the insurance company requested that petitioner write the employer for such confirmation [R. T. 873-876].

Officer Meng visited petitioner's office for the purpose of giving to petitioner Dr. Matloff's false medical report, *which Meng and Matloff had jointly prepared the day before.* [R. T. 744-756]. Knowing the report was completely false, Meng only told petitioner that Matloff had "changed a few things", and pointed to the minor matter of the date. (App. A p. 8). He also said the report was a "pack of lies", but he nevertheless *substantiated* it in that *he claimed he had made the 26 visits to Dr. Matloff, as stated in the report* [R. T. 741][5] that he had lost two and one-half weeks of work at $150 per week because of the accident, (saying his

---

[4]Buchholz had testified that he had told petitioner that he was "not hurt or injured", but the transcript of the recorded conversation records him as saying "there *is* nothing wrong with me"... (*i.e.* present condition). [R. T. 1038]. Buchholz agreed that all his conversations were recorded. [R. T. 333-334].

[5]Meng admitted this in his testimony. The statement apparently occured in one of the omissions in transcription. Matloff's report shows that Meng had received 26 treatments. [D.C.C.T. 55, 56].

wife was "still working, Thank God!"); and that he "only had a couple of odd jobs". (App. A pp. 10-11). Such representations were of course only consistent with the injury petitioner believed Meng had sustained.

Meng also allowed petitioner to receive and rely upon the subsequent report of Dr. Harder (App. A p. 11) without telling petitioner that *that report, too, would also be completely false.* Dr. Harder's report, later received by petitioner, stated that Meng was injured with a "whiplash of neck". [D.C.C.T. 59-60; R. T. 988].

After Meng's visit to petitioner's office, he, too, sent petitioner a written report in which he represented that he was *under the care of Dr. Harder, and Dr. Matloff;* that he had been billed by those doctors in the amounts shown in their reports; and made other statements which were consistent with those false medical reports. [D.C.C.T. 61].

Petitioner subsequently settled the two alleged "injury" cases of his two "clients" with insurance representatives who had been instructed to go along with petitioner and treat these as routine cases. [R. T. 172-176, 219]. In negotiating these settlements no representations of fact were made by petitioner to the insurance companies except as had been related to him by his "clients", and petitioner believed the cases to be legitimate.

At no time was petitioner ever told in frank terms that the alleged claims were in fact fraudulent. When petitioner expressly told Meng that *if the case was a fraud he would not go along with it,* Meng replied, *"I don't know."* (App. A p. 9). But, when petitioner

sought to establish his innocence by resort to the defense of entrapment, on the theory that he had been "framed" by the agents, California law held he was precluded from the benefit of that defense because he had refused to admit he had *committed* the crimes charged against him.

Although the state law imposed these stringent conditions upon petitioner, the State Bar Association, of which petitioner was a member by state law, had admonished all attorney members to expect some confusion and contradictions in histories of injury related by their clients. (*Medicolegal Aspects of Head, Neck and Back Injuries;* Calif. Practice Handbook No. 4, Sponsored by State Bar of Calif., pp. 146-149, 196-197). This publication also advised reliance upon the medical report since the client frequently is unaware of the nature or extent of injury and only the doctor can judge it competently.

The agents did not have warrants of arrest or search when they entered petitioner's office by the fraudulent means here complained of.

The Federal Questions Were Properly Raised and Preserved.

The defense of unlawful entrapment was raised in the trial court: R. T. 30-36, 173, 182-183, 250-255; Rep. Part. Tr. 48-49; C. T. p. 36; *See Appendix D*, p. 42.

The question was dealt with in the State appeal (206 Cal. App. 2d 532):

> "There can be no question of the proper presentation of a federal claim when the highest state court passes on it."
>
> *Raley v. Ohio*, 360 U.S. 423, 436.

Objections to the conversations and recordings that were illegally seized in petitioner's office by means of the fraudulent entries of the agents, without warrants, were duly made: R. T. 336, 354, 542, 549, 560, 716.

Reasons for Granting the Writ.

1. Petitioner in this case did everything that could reasonably be expected to assert the defense of entrapment (See Appendix D, pp. 42-49). But California law must necessarily have precluded consideration of the defense at the time of trial, since petitioner had refused to admit guilt as required by state law before availability of the defense (*People v. Benson*, 206 Cal. App. 2d 532). The trial court in this case returned a verdict of "guilty" without rendition of any special findings or conclusions to reveal its mental processes. Nevertheless, respondents have at all times argued that "The trial court *may* have permitted the use of this defense and then simply rejected it" (See Br. for Resp., U.S. Sup. Ct., No. 686, Oct. Term, 1962).

Thus, the strongest case that respondents are able to make on this issue necessarily admits that all issues determinative of petitioner's guilt or innocence *were not reliably found*. This alone constituted a denial of petitioner's right to due process guaranteed under the 14th Amendment *Rogers v. Richmond*, 365 U.S. 534; *Jackson v. Denno*, 378 U.S. 368. The federal courts below are in conflict with major decisions of this court in failing to send the case back to the state court for hearing and findings upon the issue of entrapment (*Rogers v. Richmond*, *supra*, *Townsend v. Sain*, 372 U.S. 293; *Jackson v. Denno*, *supra*).

2. State and federal courts throughout the United States are clearly split over the issue of whether the defense of entrapment is available to a defendant who maintains his innocence:

(a) Some courts say that the position of the defendant is inconsistent with the maintenance of the defense on the ground that "the invocation of the defense necessarily assumes that the act charged as public offense was committed" (206 Cal. App. 2d 532).

State Courts:

People v. Benson, 206 Cal. App. 2d 517, 532; (Concurrently, however, California holds that in misdemeanor prosecutions, the defendant *is* entitled to the defense of entrapment although he denies commission of the offense. *People v. West,* 139 Cal. App. 2d Supp. 923, 926. California's position is criticized locally by eminent text writers: *Witkin, California Crimes,* pp. 169-179).

Federal Courts:

Ramirez v. United States, 9th Cir. 294 F. 2d 277;

United States v. Di Donna, 2d Cir. 276 F. 2d 956;

Rodriguez v. United States, 5th Cir 227 F. 2d 912.

(b) Other courts hold that even though the defendant refuses to admit guilt he is entitled to the defense

of entrapment, on the ground that "the defenses (are) alternative but not inconsistent."[6]

State Courts:

State v. Taylor, 375 S.W. 2d 58 (Mo. 1964).

Federal Courts:

Hansford v. United States, D.C. Cir. 303 F. 2d 219;

Crisp v. United States, 4th Cir. 262 F. 2d 68, 70;

Henderson v. United States, 5th Cir. 237 F. 2d 169, 173.

(c) Some courts hold that the defense of entrapment is not available at all.

Roden v. State, 209 Tenn. 202.

It is clear that a conviction procured by entrapment violates the defendant's due process rights. *Raley v. Ohio,* 360 U.S. 423, 439; *Banks v. United States* (9th Cir.) 249 F. 2d 672, 673; *Cox v. Louisiana,* 33 U.S.L.W. 4105. It necessarily follows therefore that any denial of the defense, *except upon prior self-incrimination,* likewise violates that provision. *Jones v. United States* (362 U.S. 257); *Malloy v. Hogan,* 378 U.S. 1.

The rule forces a defendant, *who seeks to prove he is innocent because of entrapping conduct of the officers,* to elect between the equally unacceptable alternatives of either incriminating himself on the one hand, or

[6]"It was consistent with defendant's denial of the transaction to urge that if the jury believed it did occur the government's evidence as to how it occurred indicated entrapment." *Hansford v. United States* 303 F. 2d 219, 224.

relinquishing forever the additional issues that arise by virtue of the defense.[7] He is either denied a hearing entirely, or forced to incriminate himself to gain the hearing, either or both of the alternatives being a denial of his due process rights.

3. When officers adopt the "artifice and stratagem" of posing as narcotics offenders *the pose itself is notice to the defendant of the illegality of the activity he is invited to join.* But when the agents here posed as petitioner's *clients*, who had been *injured in automobile accidents*, they adopted a pose of an entirely legal activity, which petitioner, as their supposed attorney, was legally entitled to join.

The pose gave petitioner absolutely no notice of the fact that he was engaging in anything illegal. He had every right to assume that he was legitimately representing real clients who had suffered the injuries and damages they represented.

It is an "indefensible sort of entrapment" for a state to convict a defendant for doing an act which that government's conduct has misled him into believing was lawful. *Raley v. Ohio*, 360 U.S. 423; *Cox v. La.*, 33 U.S.L.W. 4105; *Voves v. United States*, 249 Fed. 191, 192; *United States v. Healy*, 202 Fed. 349, 350; *Sorrells v. United States*, 287 U.S. 435, 442.

The conduct of the state is especially deplorable here, where it has placed petitioner "in the attitude of having committed a crime which he did not intend to commit" (*Cf. Sorrells, supra*, 442), and now precludes

---

[7]The entrapment defense raises two issues: (1) inducement by the agents to commit the offense; (2) the willingness of the accused to commit it. *United States v. Sherman*, 200 F. 2d 880; *Hansford v. United States*, 303 F. 2d 219, 224.)

proof of that fact by holding that *petitioner is precluded from proving his innocence except upon condition that he first admit that he is guilty* (206 Cal. App. 2d 532).

4. Clearly there is no illegal entry, search and seizure in those cases where the decoy agents are knowingly invited into a business office for the purpose of transacting palpably illegal business[8], nor in the case where the premises are open to the general public by express or implied invitation.[9] But when consent to an entry is gained fraudulently, under the pretense of discussing *legitimate business matters,* no real consent has been given and the evidence must be excluded as violative of the defendant's fourth amendment rights. *Gouled v. United States,* 255 U.S. 298; *Wong Sun v. United States,* 371 U.S. 471, 483; *Mapp v. Ohio,* 367 U.S. 643. Such conduct also violates his recently declared Fifth Amendment rights. *Gouled v. United States, supra; Malloy v. Hogan,* 378 U.S. 1.

Conclusion.

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

RALPH R. BENSON,
Petitioner, Pro. Se.

---

[8]*Carbo v. United States,* 9th Cir. 314 F. 2d 718; *Todisco v. United States,* 298 F. 2d 208; *Lopez v. United States,* 363 U.S. 427.

[9]*On Lee v. United States,* 343 U.S. 747, 749.

APPENDIX A.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

The People of the State of California, Plaintiff and Respondent, vs. Ralph R. Benson, Defendant and Appellant. Criminal No. 7764.

Filed Aug. 6, 1962.

Appeal from a judgment of the Superior Court of Los Angeles County. Frederick W. Mahl, Jr., Judge.

Cantillon & Cantillon, Richard H. Cantillon for appellant.

Stanley Mosk, Attorney General; William E. James, Assistant Attorney General; William B. McKesson, District Attorney; Harry Wood and Harry B. Sondheim, Deputy District Attorneys.

Benson, Isaac Matloff and Edwin T. Harder were charged by information with conspiracy to commit grand theft and to violate section 556[1] of the Insurance Code (count I), in count II with a violation of section 556, *supra*, on or about March 10, 1960, and in count III with another violation of section 556 on or about April 28, 1960. After the commencement of trial to a

---

[1]Section 556 of the Insurance Code: "It is unlawful to: (a) Present or cause to be presented any false or fraudulent claim for the payment of a loss under a contract of insurance. (b) Prepare, make, or subscribe any writing, with intent to present or use the same, or to allow it to be presented or used in support of any such claim. Every person who violates any provision of the section is punishable by imprisonment in the State prison not exceeding three years, or by fine not exceeding one thousand dollars, or by both."

jury, Matloff and Harder entered guilty pleas to attempt to violate section 556. Trial without a jury was then continued as to Benson only; he was adjudged guilty on all three counts. The appeal is from the judgment (order granting probation) and the order denying a new trial.

Benson is an attorney; Matloff, a chiropractor, and Harder, an osteopath. On December 11, 1959, one Buchholz was involved in a rear-end collision. He sustained no personal injuries, although one Orr became liable to Buchholz for property damage to Buchholz' car. Three days later Matloff came to Buchholz' home; he was referred to Buchholz by an employee of the agency where the car was taken for repairs. The employee had been promised $25 by Matloff for every rear-end collision case referred to him. Matloff told Buchholz, whom he had never previously met, that the latter "could make some money on this accident because it was a rear-end collision, and if I (he) would say I (he) had a whiplash, that there would be no way to prove otherwise." Buchholz was also told that Benson would be the attorney handling the case and that he would be contacted by Benson within a few days. Buchholz advised Matloff that he would think it over. Two days after Matloff's visit, a Mr. Potter from Benson's office called at Buchholz' home. He filled out some papers and asked Buchholz to sign them; Buchholz said he wanted to "sleep on it" before employing Benson. Buchholz then went to the police who, in turn, contacted the District Attorney's office; Buchholz was told to play along — or, in effect, to act as a decoy. Potter paid Buchholz a second visit about a week later. Buchholz signed certain papers and explained how the accident happened. There-

after, Matloff came to Buchholz' house on six or seven occasions; only one treatment was given, however. Buchholz told Matloff that he was not hurt; but Matloff stated that the bigger his (Matloff's) bill, the bigger would be Buchholz' recovery. Benson admits that the medical bills and reports as to Buchholz were "undeniably false." One such bill stated that Buchholz had been given 26 treatments. It was forwarded by Benson on March 10, 1960, to Orr's insurance carrier. After the company requested an itemized bill, on March 23, a more detailed bill was forwarded by Benson — it made reference to various dates when Buchholz had been assertedly treated by Matloff.

On March 4, 1960, Buchholz took Robert Meng, an investigator from the District Attorney's office, to see Matloff. Posing as a person who had been recently involved in a rear-end collision with one Hawkins, although such was not the fact, Meng told Matloff that he had not been injured; Buchholz had previously advised him, however, that he (Meng) might make some money and Matloff agreed. In this regard, Matloff stated: "You are always injured in a rear-end collision. You get a whiplash." When mention was made of getting an additional doctor, Matloff said that he and Harder had been working with Benson for quite some time; that Harder would give the same diagnosis after he had seen Matloff's report. Matloff took some X-rays; he then telephoned Benson who talked to Meng. Benson asked Meng if he was working; when Meng said "No," Benson said, "You were working." Meng replied, "Well, okay." Meng was afterwards seen by Harder. As in the instance of Buchholz, Benson now admits that Matloff and Harder submitted false reports for service

rendered Meng. These bills and reports were forwarded by Benson to the Insurance carrier for Hawkins.

Although not specifically charged in the information, evidence was introduced (apparently without objection) that Benson had forwarded to still another insurance carrier a false report of Dr. Harder pertaining to one Villabisencio. It appears that Villabisencio received a bill from Harder for 14 visits, whereas the latter had seen Villabisencio not more than 5 times. When Villabisencio telephoned Benson about the matter, Benson said: "Well, you sign it, I am your attorney, and if I tell you to sign it, you sign it; don't sign anything else unless I tell you." Villabisencio signed the bill; subsequently Benson submitted to the insurance company a bill similar to that signed by the client.

Much of the People's case against Benson consisted of certain recorded conversations he had with Buchholz and Meng. On January 14, 1960, Buchholz went to Benson's office on order of the District Attorney's office; prior thereto a miniphone was installed on his person. Benson told Buchholz that he was in touch with California Casualty, the insurance carrier for Orr, and that he would also be in touch with Matloff. Buchholz testified that in response to Benson's question he told appellant that he was not hurt.[2] In February or March Buchholz had another conversation with Benson, this time by telephone, wherein he told Benson that his neck and back were not injured.

---

[2]When the tape recording was played to Benson, then under cross-examination, Buchholz was heard to say: "You know, there is nothing wrong with me, I don't want to get into any trouble." Asked if his memory was refreshed that Buchholz made such a statement, Benson replied: "Yes, he did." The recording was admitted into evidence without objection.

On March 25 Meng telephoned Benson. The conversation was recorded, the transcription thereof being as follows:

"Office Girl: Hello, Mr. Benson's office.

"Mr. Meng: May I speak to Mr. Benson, please?

"Office Girl: Who is calling?

"Mr. Meng: This is Bob Meng.

"Office Girl: Bob Meng?

"Mr. Meng: Meng, M-e-n-g.

"Office Girl: Do you want to know when your case is coming on?

"Mr. Meng: No. I'd like to discuss something with him if I could.

"Office Girl: This isn't regarding a case, though, is it?

"Mr. Meng: Yes, it is.

"Office Girl: Will you hold the line a second, please.

"Mr. Meng: All right.

"Mr. Benson: Hello, Bob.

"Mr. Meng: Yes.

"Mr. Benson: Ralph Benson.

"Mr. Meng: Yeah; how are you?

"Mr. Benson: Okay.

"Mr. Meng: Listen. I got a phone call last night from this fellow Hawkins, the guy that hit me—

"Mr. Benson: Yeah, he's out of his mind

"Mr. Meng: (Laughing)

"Mr. Benson: He's out of his mind.

"Mr. Meng: Well, what do you say —

"Mr. Benson: He wants to settle this for very little money.

"Mr. Meng: Uh-huh.

"Mr. Benson: Did he mention any money to you?

"Mr. Meng: No, he didn't, but he was —

"Mr. Benson: So that his company wouldn't be bothered.

"Mr. Meng: Well, he seems kind of shook up about it, and he's got me a little bit shook up because —

"Mr. Benson: Why — why should it shake you up?

"Mr. Meng: Well, see — you have talked to Matloff or Harder about this thing?

"Mr. Benson: Why?

"Mr. Meng: Well, I told them — you know I wasn't hurt actually, and I told Harris[3] that night — the night that he came out to my house —

"Mr. Benson: That's all right.

"Mr. Meng: Well —

"Mr. Benson: That's no problem.

"Mr. Meng: Well, what do you mean it's no problem, I mean, suppose I have to go to court with this guy, or something?

"Mr. Benson: I tell you what — you're upset.

"Mr. Meng: Huh?

"Mr. Benson: You sound like a girl who has just found out she's pregnant.

"Mr. Meng: Well — (laughing) can you, — I mean, you see my point, in other words —

"Mr. Benson: I see your point. I've been a lawyer 14 years. I can see your point.

"Mr. Meng: Well —

"Mr. Benson: Just forget it.

"Mr. Meng: Well —

"Mr. Benson: Look, I'll take care of it. I mean, this case can be settled for around $1500.

---

[3]Harris is an attorney, employed at that time by Benson.

"Mr. Meng: Uh-huh.

"Mr. Benson: If you — if you want to feel that's not enough — that's too much money for you — this guy — other guy will probably give you $200 to forget it.

"Mr. Meng: Uh-huh. Well, whatever you say, you're the boss; but I wanted to talk to you about the case, as I say —

"Mr. Benson: All right, * * * from work?

"Mr. Meng: Huh?

"Mr. Benson: You lost any time from work?

"Mr. Meng: Did I loose anytime from work?

"Mr. Benson: Yeah.

"Mr. Meng: No, see, I told Joe Harris that night, see, I wasn't work — huh?

"Mr. Benson: That's okay. Now, look don't worry about this. Just don't talk to anybody but me and Dr. Matloff, and quit talking to the other guy.

"Mr. Meng: Okay, you're the boss, whatever you say.

"Mr. Benson: Okay?

"Mr. Meng: Okay.

"Mr. Benson: I'll be in touch with you.

"Mr. Meng: Righto.

"Mr. Benson: Good-bye.

"Mr. Meng: Goodbye."

On April 18 Matloff signed a medical report pertaining to Meng. Various questions in the report were answered falsely — these false answers, according to Meng, he did not furnish to Matloff. The next day, pursuant to Matloff's suggestion, Meng took one or two copies of this report to Benson's office. At that time he had a conversation (likewise recorded) with the appel-

lant who, while under direct examination, read its transcription into evidence:

"Mr. Meng: Well, listen, you undoubtedly talked to Joe Harris about this. Like I said Matloff called me and asked me to come out and fill this thing out with him, which is fine except he has changed a few things on it, and that's fine as long as I don't have to go to court, but, . . ., he's got nothing but a bunch of lies on that thing.

"Mr. Benson: Where are his lies?

"Mr. Meng: Well, to begin with, he's got a different date on there as to the date that Joe came out to see me, and Joe came out the same day that I saw him for the first time.

"Mr. Benson: Makes it seem though you didn't.

"Mr. Meng: Right.

"Mr. Benson: What's the date?

"Mr. Meng: I don't remember exactly.

"Mr. Benson: Did you go to the doctor the next day?

"Mr. Meng: No, I didn't.

"Mr. Benson: Well, that's something you and the doctor must decide between yourselves in matters of your own conscience.

"Mr. Meng: Well, as I say, everthing's fine as long as I don't have to go to court because . . ., that's all I got to do is get court (*sic*) in a lie or something and I'd spend ten years in jail."

"Mr. Benson: Well, I don't know how many times you have seen him. I wasn't there. Whatever it is, it is, and I go by and submit to the company whatever is said to me by the doctor. If you feel this is a lie, we'll drop the whole case right now."

"Mr. Meng: Well, I —

"(then Mr. Benson says something unintelligible.)

"This thing is dropped.

"Mr. Meng: Whatever you think, as I say I don't know, like I told Joe the night he came out to fill out this accident form, or whatever the heck it is, I told him then the same thing I told Matloff, that I wasn't actually hurt in the thing.

"He said, 'Well, don't talk to me. Talk to Matloff and Mr. Benson.'

"And I said, 'All right,' and when I talked to you on the phone —

"Mr. Benson: I am not going to participate in a fraud. If this is a correct — if you and the doctor say this is correct, I'll go along with you. If you say it is incorrect —

"Mr. Meng: Well, as I say—

"Mr. Benson: I am not going to participate in a fraud. I never had for 14 years and I don't intend to.

"Mr. Meng: Fine. (and then something unintelligible)

"Mr. Benson: If you say this is untrue, let's forget the whole thing. You figure it out for yourself.

"Mr. Meng: I don't know.

"Mr. Benson: What's your age?

"Mr. Meng: Thirty-five.

"Mr. Benson: Thirty-five and you haven't learned anything about life yet.

"Mr. Meng: Haven't learned anything about life?

"Mr. Benson: Yeah, life.

"Mr. Meng: Yeah, I learned something about life.

"Mr. Benson: All right. Did you get a third copy of this?

"Mr. Meng: No. He said he wanted to keep one copy and send one copy to Dr. Harder.

"Mr. Benson: It's all right.

"Mr. Meng: Yeah, everything was fine until this guy Hawkins called me up and then —

"Mr. Benson: Who's Hawkins?

"Mr. Meng: That's the guy that hit me.

"Mr. Benson: What did he say?

"Mr. Meng: He wanted to know what the heck I was doing and I said, 'What do you mean, what am I doing?' And he said, 'Well, I got a letter from my insurance company saying that somebody's filing suit against me,' and I said, 'Buddy, I don't know what you're talking about.' Remember I called you and told you he called me?

"Mr. Benson: Yeah. So what? Hawkins is not supposed to call you.

"Mr. Meng: Huh?

"Mr. Benson: Hawkins is not supposed to call you.

"Mr. Meng: Well, as I say, I've never had that happen to me before and I didn't know what was going on.

"Mr. Benson: At the time of this collision you were unemployed looking for work.

"Mr. Meng: Right.

"Mr. Benson: You earned about $150.00 a month.

"Mr. Meng: $150.00 a week.

"Mr. Benson: A week.

"Mr. Benson: When did you finally get back to work?

"Mr. Meng: About two and a half weeks, February 18th.

"Mr. Meng: I haven't actually, I've had a few odd jobs. —

"The Witness: (Reading)

"My wife is still working, thank God, but I've only had a couple of odd jobs.

"Mr. Benson: How many children do you have?

"Mr. Meng: Beg pardon?

"Mr. Benson: How many children?

"Mr. Meng: Two. Boy and a girl.

"Mr. Benson: When was the first time you went back to work after February 18th.

"Mr. Meng: About three weeks ago. I had a job for four days.

"Mr. Benson: What day did it start?

"Mr. Meng: Beg pardon?

"Mr. Benson: What day did it commence?

"Mr. Meng: Have you got a calendar?

"Mr. Benson: Right.

"Mr. Meng: Well, let's see. Today is the — what's today? The 19th.

"Mr. Benson: Well, they've got you down for one week so I'll have to turn it in. Well okay as soon as I get the report from Dr. Harder I'll submit a copy to you and give a copy to the company and we'll have this case settled.

"Mr. Meng: All right. Will you get in touch with me then?

"Mr. Benson: Okay.

"Mr. Meng: Do you want me to call you or what?

"Mr. Benson: No. I'll be in touch with you. I've got your number.

"Mr. Meng: well, as I say I'm not adverse to making a buck, but you know.

"Mr. Benson: Yeah.

"Mr. Meng: As long as I don't have to go to court, I don't care.

"Mr. Benson: Okay.

"Mr. Meng: Okay, thanks very much."

On April 28, Benson mailed to Hawkins' insurance company Matloff's report, testified to by Meng, and a

report from Harder. Matloff's report included the following answers to the following questions: "How many times have you treated the patient? 26 times. What is the precise location, nature and extent of the injury as revealed by your examination? Occipital headache, neck tension, sacroiliac tension. What is the period of time patent has been confined at home or in hospital? One week."

Benson testified on his own behalf. He stated that he relied upon the medical reports and oral information furnished him by his clients' doctors. The ultimate issue for determination, therefore, was appellant's knowledge or lack of knowledge of the falsity of the Matloff and Harder reports. He challenges the adverse finding in this regard; we now take up this first assignment of error.

Although appellant concedes that the resolution of conflicting inferences is for the trier of fact, he now asks this court to say that as a matter of law an inference of guilt cannot be drawn from the evidence adduced. That being so, he further contends, "the element of wilfulness essential to each offense is totally lacking."[4] Furthermore, he says the conversations out of his presence between Buchholz, Meng, Matloff and Harder were inadmissible since the existence of a conspiracy cannot be inferred unless appellant had the required knowledge of the falsity of the claims; on the other hand, it is conceded, the existence of a conspiracy

---

[4]"The word 'wilfully' as used in criminal statutes implies a purpose of willingness to commit the act (Pen. Code, Sec. 7, subd. 1), and although it does not require an evil intent, it implies that the person knows what he is doing intends to do what he is doing [illegible] a free agent." (*In re Trombley*, 31 Cal. 2d 801, 807.)

can be inferred if appellant had such required knowledge.

It has been stated that in prosecutions for violating section 556 of the Insurance Code, "The basis of the offense alleged is the defendant's intent to defraud . . ." (*People v. Turley*, 119 Cal. App. 2d 632, 636.) A person who knowingly or wilfully submits a claim, knowing it to be false, necessarily does so to defraud. (*People v. Haydon*, 106 Cal. App. 2d 105.) Generally, "Whether (a defendant) made these representations in good faith or whether he made them knowing they were false, or in reckless disregard of the truth and without information justifying the belief, (are) questions for the (trial court). Intent cannot always be proved by direct evidence. Many times it has to be determined from a consideration of all the circumstances surrounding the doing of an act . . . An intention to defraud is an essential element of the charged offenses, but such intention is inferable from all the facts of the case and need not be substantively proved . . ." (*People v. Henderson*, 79 Cal. App. 2d 94, 117-118.) See also *People v. Burnham*, 194 Cal. App. 2d 836, 841-842; *People v. Proctor*, 169 Cal. App. 2d 269, 279.) Although his counsel has extensively argued that appellant's case is in effect *sui generis*, we are satisfied that the present point is governed by the familiar rules stated above. It has been said countless times, ar was rather recently reiterated by the Supreme Court, that, "The choice of which inference is to be drawn from the facts, where more than one reasonable inference is possible, is the function of the jury." (*People v. Sweeney*, 55 Cal. 2d 27, 51.) That the challenged inference of actionable knowledge or scienter and reckless disregard of the truth was reasonably drawn is clear from the following facts.

With respect to the Buchholz transactions, Benson was advised on two separate occasions that Buchholz was not injured. Thus, on January 14 (the recorded conversation) Buchholz told appellant that he was not hurt or injured. Again, in February or March, Buchholz telephoned appellant and stated that his neck and back were not injured. Notwithstanding these unequivocal statements, appellant shortly thereafter forwarded the medical reports to the responsible insurance carrier; such action belies a cautious concern for the true facts which is expected of an attorney with 14 years in the practice, most of which practice (appellant stated) was in this particular field. A different picture is portrayed in appellant's briefs, wherein he points to several asserted discrepancies in the Buchholz testimony, recorded and otherwise; other arguments are directed toward the lack of credence to be accorded this witness. Despite a painstaking effort in this regard, all these arguments were for resolution by the trier of fact. Appellant's testimony, on the other hand, reflects more than mere discrepancies; it contains an outright contradiction, upon cross-examination, of what he testified to while under direct examination. (See footnote 2 herein.) When false testimony is thus given, it is evidence of consciousness of guilt from which, along with other evidence, a determination of guilt may be inferred. (*People v. Wayne*, 41 Cal. 2d 814, 823.) Indeed the inference in question does, and should, carry more weight when the false testimony comes from the lips of an attorney; this, despite appellant's claim that there was no "intentional falsity." The area of interrogation related to pivotal points in the case and not minor or incidental matters.

With respect to the Meng transaction, again Benson was twice informed of the true facts. On March 25, Meng advised appellant by telephone that he "wasn't hurt actually," and Benson replied, "That's all right." Though thus previously advised, Benson in the same conversation later said: "That's no problem," "just forget it," and "look I'll take care of it." The entire conversation has heretofore been quoted; considered as a whole, it supports the trial court's implied conclusion that appellant had little concern for his responsibilities in the premises and was determined, recklessly or fraudulently, to proceed forthwith with the processing of his client's claim. Meng again informed Benson of the falsity of his claim at appellant's office on April 19 — this conversation has also been heretofore quoted *in toto*. Meng told appellant that Matloff's report contained "nothing but a bunch of lies" which, of itself, warranted some restraint on appellant's part; the report, devoid of any changes, was nevertheless mailed to the responsible insurance company. It is, of course, true that in the course of this conversation Benson told Meng that he "was not going to participate in a fraud, . . . never had for 14 years . . . don't intend to." He also stated: "Well that's something you and a doctor must decide between yourselves in matters of your own conscience." A scrupulous concern for his duties as an attorney would have dictated that appellant not thus stand aside and let others determine where the truth lay; certainly appellant's position, thus revealed, seems out of harmony with his statutory duty, "To employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth . . ." (Bus. & Prof. Code, Sec. 6068(d)). Situations will arise where there is an *honest* difference of opinion, but this is not such a case.

As noted earlier, appellant concedes that the existence of a conspiracy can be inferred if the evidence shows that he had the knowledge requisite to the commission of the substantive offense; he also concedes, apparently not challenging the fact that a *prima facie* case was made out, that the declarations and statements made by his coconspirators outside his presence would be admissible. (*People v. Robinson*, 43 Cal. 2d 132, 137.) These statements we briefly refer to. On February 5, Matloff told Buchholz: "Well, you see, the point is the insurance doesn't know what shape you're in, and talk about Benson, he doesn't care whether you're in bed our out of bed. It wouldn't make any difference." On March 4, Matloff told Meng that he and Harder had been working with Benson "for quite some time"; that Harder would see his X-rays and give the same diagnosis. On March 22, Meng advised Harder that neither he nor Buchholz had been injured in any accident. Harder then told Meng not to worry about it because Benson would see to it that neither of them would have to go to court; he also told Meng that he had been working with Benson "for about three years." On March 23, Meng told Matloff that Harder had not examined either Buchholz or himself; Matloff replied that it didn't make any difference because Harder had worked with him and Benson and knew what to do. This and other evidence, unnecessary to relate, clearly show a corrupt agreement among the parties concerned (accompanied by overt acts) to commit the substantive offenses charged; that is the gist of the crime of conspiracy.

As his next assignment of error, appellant contends that he was entrapped; he does so notwithstanding his consistent denial that the crimes complained of were

committed. His position is similar to that of the appellant in *People v. Lee*, 9 Cal. App. 2d 99, where Lee denied that any sale of contraband was made or that he had any narcotics in his possession, but still argued entrapment. At pages 109, 110, the court there said: "It is our understanding that the defense of entrapment is a positive defense imposing upon an accused the burden of showing that he was induced to commit the act for which he is being prosecuted. *The invocation of the defense necessarily assumes that the act charged as public offense was committed.*" (Emphasis added.) The holding in *Lee* was followed in *People v. Gelardi*, 77 Cal. App. 2d 467, 477, which quotes the language of the court above emphasized; the Supreme Court without a dissenting vote thereafter denied a hearing in *Gelardi*. Later cases in accord include *People v. Polsalski*, 181 Cal. App. 2d 795. Appellant claims that the declaration in *Polsalski* with reference to entrapment is dictum; dictum or otherwise, the law seems clear that appellant's position is inconsistent, and furthermore no California case is cited in support of the present assignment. Under the circumstances, we need not discuss the additional claims (although neither is tenable) that appellant was *in fact* entrapped or that the evidence establishes entrapment as a matter of law.

As his next contention, appellant argues he could not be convicted of violating section 556 of the Insurance Code because neither Buchholz nor Meng, as distinguished from a policyholder, had a contract of insurance with the companies to whom the claims were presented; this is not the first time such a contention has reached our reviewing courts. As provided in the statute (footnote 1), the false or fraudulent claim must be for the

payment of a loss "under a contract of insurance." The claims of Buchholz and Meng, says appellant, were *ex delicto* and not *ex contractu*, particularly in the absence of evidence that the policies in question gave either of the supposedly injured persons direct rights inuring to his benefit. This later type of policy is encountered in *Connell v. Clark*, 88 Cal. App. 2d 941, and *Giordano v. Amer. Fid. & Cas. Co.*, 97 Cal. App. 2d 309, being written pursuant to the direction of statute or ordinance; there are also cases where the argument has been that the contract of insurance was for the benefit of unnamed third persons. (See generally *Johnson v. Holmes Tuttle Lincoln-Mercury, Inc.*, 160 Cal. App. 2d 29.) Ordinarily, however, judgment must first be secured against the insured before the injured person has a right of action against the insurer on the policy. (Ins. Code, Sec. 11580.)

It was pointed out earlier that the gravamen of the substantive offense is the defendant's intent to defraud. The Legislature realistically provided in the concluding paragraph of section 556 that "*Every* person who violates any provision of this section is punishable by imprisonment . . ." (Emphasis added.) In turn, we propose to be realistic in our interpretation of its coverage, particularly in the light of the circumstances at bar. It is a matter of common knowledge that insurance companies negotiate settlements directly with injured parties or their attorneys because of the liability of their insured. Benson testified that he sent letters to both companies, as well as their insured (Orr and Hawkins), stating that all communications respecting the claims should be sent to him directly. Benson was no neophyte in this area of practice — it represented, he

stated, about 60% of his professional activities. The insurance companies subsequently dealt with appellant directly — in line with customary practice and pursuant to Benson's instructions.

Furthermore, appellant cites no California authority to sustain his position on the specific point in question save for a New York case (*People v. Learman,* 121 N. Y. S. 2d 388) the reasoning of which we are not obligated to follow. In California, however, there is precedent for the respondent's answer to the present ingenious argument. *People v. Grossman,* 28 Cal. App. 2d 193 (hearing by the Supreme Court denied) likewise involved a violation of section 556; it also involved a situation where there was no privity between the defendants and the insurance carrier. The defendants included a doctor and a lawyer, and the conviction was affirmed even though the claim was made on behalf of a third party who had no rights under the contract of insurance alleged in the indictment. Only one defendant appealed. Said the court: "The defendant seems to contend that prosecution was bound to show that the contract of insurance . . . imposed liability upon the insurer. The first answer is that prosecution made the showing. The second answer is that the gravamen of the offense alleged was the defendant's intent to defraud. That intent did not depend solely on the legal obligation, if any, arising out of the said contract. (Citation.)" (p. 202) Rather recently in *People v. Reed,* 190 Cal. App. 2d 344, we had occasion to express our agreement with the treatment of the problem in *Grossman;* appellant has told us nothing which serves to change our views in that regard.

Appellant's final point is that there was an unreasonable search and seizure. He charges that Buchholz and Meng acted as "decoys" and that the various recordings obtained by use of the miniphone were inadmissible. There is merit to neither claim. See *People v. Wojahn*, 169 Cal. App. 2d 135, 142 (recorded conversations); *People v. Lagomarsino*, 97 Cal. App. 2d 92, 97 (decoys).

For the reasons stated the judgment (order granting probation) and the order denying a new trial are affirmed.

Lillie, *J.*

We concur:

Wood, *P. J.*

Fourt, *J.*

APPENDIX B.

Order Denying Petition for Writ of Habeas Corpus.

United States District Court, for the Southern District of California, Central Division.

Ralph R. Benson, Petitioner, vs. People of the State of California, Peter Pitchess, Sheriff of the County of Los Angeles, Leland Carter, Probation Officer of the County of Los Angeles, Respondents. No. 63-1267 HW.

Ralph R. Benson was charged by Information in the Superior Court of the State of California, in and for the County of Los Angeles, with conspiracy to commit grand theft and to violate § 556 of the Insurance Code of the State of California.

Trial was had without a jury, and defendant was found guilty by the Court. The District Court of Appeal affirmed the judgment of the Superior Court. Petition for rehearing was denied; and a petition for hearing by the Supreme Court of the State of California was also denied. The United States Supreme Court denied certiorari.

After exhaustion of available state remedies, Ralph R. Benson now files with this court a petition for writ of habeas corpus, alleging the California courts denied him the right to have his case heard under state procedures conforming with the requirements of the Fourteenth Amendment to the United States Constitution. Answer to the petition for writ of habeas corpus was duly filed by respondent, State of California, and the matter came on regularly for hearing before this court.

Review of the entire record has been made — that of the state trial court, the appellate proceedings, and the proceeding before the United States Supreme Court. Examination of the records and files in this matter discloses no denial of due process to the petitioner herein; and this Court is further of the opinion that petitioner has attempted to create substantial federal questions without evidence or law to support his contentions.

State prisoners (having exhausted appellate procedures in state courts), in filing petitions for writs of habeas corpus in federal courts to attack state court judgments, have presented many complex and varied problems to the federal courts. Although it is the duty of a federal court to examine the entire record of the state court proceedings, that examination is limited to the ascertainment of whether it appears petitioner has been denied any right accorded by the Constitution of the United States.

In *Grundler v. State of North Carolina*, 283 F. 2d 798 (Fourth Circuit), the Court said, at page 800:

> "The appellants argue that their trial in the state court was so unfair as to constitute a denial of due process of law under the Fourteenth Amendment to the United States Constitution. In support of this, they point to alleged errors in the admission and exclusion of evidence, * * *.
>
> "* * *
>
> "* * *
>
> "We think that the transcript of the trial demonstrates that the evidence was sufficient. Even if we entertained doubts about this, there would be no basis for a federal court in a habeas corpus

proceeding to undertake a broad review of the conviction in the state court. There is a difference between a conviction based upon evidence deemed insufficient as a matter of state criminal law, and one so totally devoid of evidentiary support as to raise a due process issue. It is only in the latter situation that there has been a violation of the Fourteenth Amendment, affording the state prisoner a remedy in a federal court on a writ of habeas corpus.

"* * *

"* * *

"The points made in the present proceeding all pertain to state law, and in the context of the trial we find no indication of fundamental unfairness. We express no opinion as to the state court's resolution of the issues raised. Even if we were to disagree, we could not intervene by habeas corpus, when the alleged errors are of a character that cannot reasonably be said to involve a deprivation of constitutional rights. Normally, the admissibility of evidence, the sufficiency of evidence, and instructions to the jury in state trials are matters of state law and procedure not involving federal constitutional issues. It is only in circumstances impugning fundamental fairness or infringing specific constitutional protections that a federal question is presented. The role of a federal habeas corpus petition is not to serve as an additional appeal."

In *Harrison v. Boles*, 307 F. 2d 928 (Fourth Circuit), the Court stated, at page 931:

"* * * the appellant contends first that the evidence at his trial was insufficient to support a verdict of murder in the first degree * * *.

"We do not think that these contentions should be sustained. They are based on the assumption that a prisoner who has been convicted of a crime and sentenced to prison after a trial under the forms of law may thereafter have a review of the proceedings at the trial by filing a petition of habeas corpus. This assumption is not tenable. It is settled by numerous decisions that errors of fact or law committed during the trial of a criminal case, which do not involve the denial of a constitutional right, may be reviewed only on appeal and not in a habeas corpus proceeding. * * *"

In *Schlette v. People of State of California*, 284 F. 2d 827 (Ninth Circuit) the Court said, page 834:

"* * *. Attacks upon the sufficiency of the evidence and the veracity of witnesses cannot be challenged through the medium of habeas corpus, but must be raised by appeals. [Citation.] The state adjudication of factual questions will be relied upon by federal courts. [Citation.] Where the basic facts are conflicting and those facts have been tried and adjudicated against petitioner without a vital flaw in the process of ascertaining such facts in the trial court, the federal court will accept that determination. * * *"

And in *Wilson v. State of Nebraska*, 316 F. 2d 84 (Eighth Circuit), the Court states the rule as follows, at page 86:

"* * *, it has long been established that sufficiency of the evidence and veracity of witnesses cannot be challenged through the medium of habeas corpus but must be raised by direct appeal. * * *"

In the case at bar there was a direct appeal by defendant. In that appeal (*People v. Benson*, 206 Cal. App. 2d 519) petitioner raised the issue of entrapment and the issue of unconscionable search and seizure, two of the issues relied upon by him in the instant proceeding for writ of habeas corpus.

Review of the entire record in the trial and appellate courts discloses nothing therein to indicate the case was not fairly tried; and there is nothing in the record to indicate defendant was denied the rights guaranteed him by the Fourteenth Amendment to the Constitution of the United States.

The petition for writ of habeas corpus is denied.

Dated: Nov. 26th, 1963.

Harry C. Westover
United States District Judge.

APPENDIX C.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Ralph R. Benson, Petitioner-Appellant, vs. People of the State of California; Peter Pitchess, Sheriff of Los Angeles County, and Leland Carter, Probation Officer of Los Angeles County, Respondents-Appellees. No. 19,069.

[September 24, 1964]

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes and Jertberg, Circuit Judges, and McNichols, District Judge.

Jertberg, Circuit Judge:

This is an appeal from a judgment of the United States District Court for the Southern District of California, Central Division, denying the petition of Ralph R. Benson, appellant herein, for a writ of habeas corpus. Jurisdiction of the District Court is based upon 28 U.S.C. § 2241(a). This court has jurisdiction to review on appeal a final order of the district judge refusing to issue a writ of habeas corpus when a certificate of probable cause has been granted. (28 U.S.C. § 2253.) Such certificate was granted in this case.

An information was filed in the Superior Court of the State of California, in and for the County of Los Angeles, against appellant, an attorney at law, and two co-defendants, one Isaac Matloff, a chiropractor, and one Edwin T. Harder, an osteopathic physician. In

Count I of the information all three were charged with conspiracy to commit grand theft and to violate Section 556 of the California Insurance Code.[1] Count II charged all three with a violation of Section 556 of the Insurance Code on or about March 10, 1960. Count III charged another violation of Section 556 on or about April 28, 1960.

At approximately the midway point in the jury trial, Matloff and Harder entered pleas of guilty to a charge of attempting to violate Section 556 of the California Insurance Code, a lesser but necessarily included offense to that set forth in Count III of the information. Upon such occurrence the appellant waived trial by jury and the trial continued as a trial to the court. Upon close of the trial the judge adjudged appellant guilty on all three counts of the indictment. Appellant's motion for a new trial was denied, sentence was suspended, and appellant was granted probation for five years on condition that he first serve one hundred eighty days in jail and pay a fine of $5,000.00.

Appellant duly appealed to the District Court of Appeals of the State of California which affirmed the

---

[1]Section 556 states as follows:

"It is unlawful to:

"(a) Present or cause to be presented any false or fraudulent claim for the payment of a loss under a contract of insurance.

"(b) Prepare, make, or subscribe any writing with intent to present or use the same, or to allow it to be presented or used in support of any such claim.

"Every person who violates any provision of this section is punishable by imprisonment in the State prison not exceeding three years, or by fine not exceeding one thousand dollars, or by both."

The defendants were charged with violating both subdivisions (a) and (b) of this section in Counts II and III of the information.

judgment of the trial court. See *People v. Benson,* 206 Cal. App. 2d 519, 23 Cal. Rptr. 908. Petition for rehearing of the appeal was denied and a petition for hearing before the Supreme Court of the State of California was denied. Petition for certiorari to the United States Supreme Court was denied. (374 U.S. 806.) Petition for rehearing of the order denying certiorari was likewise denied. (375 U.S. 870.)

Appellant then filed his petition for habeas corpus in the District Court. The District Court issued an order to show cause to the Sheriff of Los Angeles County who filed a return denying that the appellant was in any way illegally restrained of his liberty for any of the reasons set forth in the petition, or for any other reason. The hearing on the petition was heard by the District Court and a set of exhibits which constituted a record of the entire trial and appellate proceedings hereinbefore outlined was received in evidence. After hearing, the District Court denied the writ of habeas corpus. The District Court filed a written memorandum and order.

The facts, largely undisputed, are set forth in great detail in the opinion of the District Court of Appeals of the State of California (*People v. Benson, supra.*) The interested reader is referred to that opinion for the detailed statement of the facts. For that reason we deem it unnecessary to restate them here in great detail. In skeletonized form it appears as follows: One William Bucholz was involved in a rear-end collision while driving his automobile. An employee of the garage to which the car was taken for repairs notified Matloff of the rear-end collision responsive to Matloff's offer of $25.00 for such information. Matloff paid an uninvited visit upon Bucholz at his residence and told him if he would

say he had sustained a whiplash injury there would be no way to prove otherwise. Bucholz told Matloff that he had not been injured but Matloff told Bucholz that appellant, an attorney, would be in touch with him in the next few days. Bucholz said he would think it over. He then telephoned the police department and subsequently became a decoy for the District Attorney's Office. Pursuant to a call by Matloff, Potter, a young law clerk working in appellant's law office, was sent to the Bucholz residence. Bucholz told Potter that he wanted to sleep on it before he engaged appellant as his attorney. Potter tore up the papers he had brought for Bucholz to sign, and left. After the District Attorney's Office had installed recording equipment in the Bucholz residence, Bucholz telephoned appellant saying he wished to speak to Potter again. During Potter's second visit, Bucholz explained how the accident happened and again told Potter he was not injured to which Potter replied, "then there is no personal injury case."

Matloff came to Bucholz' residence on six or seven occasions but administered only one treatment. Matloff's bill reflected twenty-six treatments. Matloff explained the bigger the bill the bigger would be Bucholz' recovery. Appellant forwarded Matloff's medical bills and reports to the insurance carrier for the other party to the rear-end collision.

Later Bucholz called appellant and made an appointment to see him about the case. Bucholz kept the appointment wearing a Minifon. During the course of the recorded conversation Bucholz told appellant he was not injured. This statement was repeated again by Bucholz in a later phone conversation with appellant.

Later Bucholz, accompanied by Robert Meng, an investigator for the District Attorney's Office, called upon Matloff. Posing as a person who had been recently involved in a rear-end collision [although such was not the fact], Meng told Matloff that he had not been injured but Bucholz advised him that he might make some money, to which statement Matloff agreed. At such visit Matloff stated: "You are always injured in a rear-end collision. You get a whiplash." On the same occasion Matloff stated that an additional doctor would lend greater support to Meng's claim of injury and treatment. Matloff stated that he and Harder had been working together with appellant for some time and that Harder would give the same diagnosis. Matloff then telephoned appellant who talked to Meng. Appellant asked if Meng was working. Meng said "No." Appellant replied, "You were working." Meng replied, "Well, okay."

Later Meng telephoned appellant. The conversation was recorded. The conversation was lengthy and is set forth in *People v. Benson, supra.* During that conversation Meng told appellant that he hadn't been hurt in the rear end collision and that he had lost no time from his work.

Later Meng telephoned appellant and arranged for an appointment at appellant's office. When Meng appeared at appellant's office he was wearing a Minifon which recorded the conversation. In substance, appellant stated that if Meng and the doctor were willing to say that the facts contained on Matloff's medical forms were correct, he was willing to go along with it. Meng again told appellant he was not injured. Appellant thereafter sub-

mitted the false bills and medical reports of Doctors Matloff and Harder to Meng's insurance carrier.

Evidence was also introduced, without objection, that appellant had forwarded to still another insurance carrier a false report of Harder pertaining to one Villabisencio. It appears that Villabisencio received a bill from Harder for fourteen visits, whereas the latter had seen Villabisencio not more than five times. When Villabisencio telephoned appellant about the matter, appellant said: "Well you sign it, I am your attorney, and if I tell you to sign it, you sign it; don't sign anything else unless I tell you." Villabisencio signed the bill which appellant submitted to the insurance carrier.

Appellant's first contention is that the conversations which took place in appellant's office between appellant and Bucholz and appellant and Meng, and transcriptions of the recordings of such conversations, should have been excluded by the California trial court on the ground that they were the fruits of an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States, and compelled appellant to be a witness against himself, and deprived him of his liberty without due process of law in violation of his Fifth and Fourteenth Amendment rights. Appellant makes no contention that the trial court should have excluded, on the same ground, the telephone conversations between appellant and Bucholz and appellant and Meng, and the transcriptions of the recordings made of such conversations.

Under recent Supreme Court decisions it is clear that the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment render inadmissible in a state criminal trial all evidence obtained as a result of an

illegal search and seizure, *Mapp v. Ohio*, 367 U.S. 643 (1961), and that the legality of a state search and seizure is to be measured, for purposes of the exclusionary rule, by the "fundamental criteria" of the Fourth Amendment, *Ker. v. California*, 374 U.S. 23 (1963). Since the exclusionary rule is itself a Constitutional dictate, *Mapp v. Ohio, supra*, the question of illegal search and seizure by state authorities of evidence for use in a state criminal trial is cognizable by the federal courts on application for a writ of habeas corpus.

Appellant urges: (a) that his consent to the entries into his office by Bucholz and Meng was obtained through fraud and misrepresentation in that neither one was a "real" client, neither one suffered injuries which would form the basis of claims against insurance companies, neither one was under the treatment of doctors and Meng had not been involved in an automobile accident; and (b) that such fraud and misrepresentation vitiated his consents to such entries, thereby causing such entries to be in derogation of the rights guaranteed to him by the Constitution of the United States; and (c) finally, that the conversations held between appellant and Bucholz, and appellant and Meng, and the transcriptions of the recordings of such conversations should have been excluded on the ground that they were the fruits of an unreasonable search and seizure and compelled appellant to become a witness against himself.

It is to be noted that at the time such consents to entry were given by appellant, he was aware that neither Bucholz or Meng had suffered injuries in any automobile accident. Appellant was not aware that Meng had not been involved in an automobile accident, nor was he

aware that Bucholz was acting as a decoy and Meng was acting as an undercover agent for the District Attorney. Nor was he aware, at the time the conversations took place, that both Meng and Bucholz were wired for sound in the form of a concealed Minifon which each was wearing.

It is to be further noted that no tangible evidence was taken from appellant's office by either Bucholz or Meng, neither testified to any observations made by them while in appellant's office, nor was there any physical intrusion into the walls, furniture or equipment in the office by electronic or other devices which would permit conversations held therein to be overheard by persons other than those in the office. The only purpose which was served by the recordings of the conversations held in appellant's office was to furnish corroboration of the testimony of Bucholz and Meng.[2]

Before passing upon the validity of appellant's contention was will first review Appellate and Supreme Court decisions in the area. In *Gouled v. United States*, 255 U.S. 298 (1921), a private in the Army, attached to the Intelligence Department, and a business acquaintance of the defendant, Gouled, under direction of his superior officers, pretending to make a friendly call upon Gouled, gained admission to his office and in his absence, without warrant of any kind, seized and carried away several documents. One of these documents belonging to Gouled was introduced in evidence. It was held that it was the fruit of an unlawful search and seizure. The court stated at page 306:

---

[2]See dissenting opinion of Mr. Justice Brennan in *Lopez v. United States, infra*, at p. 448 to the effect that Minifon recordings are independent third-party evidence.

"* * *, whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence falls within the scope of the prohibition of the 4th Amendment, * * *"

In *Olmstead v. United States*, 277 U.S. 438 (1928), evidence obtained by tapping a telephone line where there was no physical invasion of the petitioner's premises was held not violative of the Fourth or Fifth Amendments to the Constitution. Discussing *Gouled* the court stated at pp. 463-464:

"*Gouled v. United States* carried the inhibition against unreasonable searches and seizures to the extreme limit. Its authority is not to be enlarged by implication and must be confined to the precise state of facts disclosed by the record. * * *. A stealthy entrance in such circumstances became the equivalent to an entry by force. There was actual entrance into the private quarters of defendant and the taking away of something tangible. Here we have testimony only of voluntary conversations secretly overheard.

"The Amendment itself shows that the search is to be of material things—the person—the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized."

In *Goldman v. United States,* 316 U.S. 129 (1942), the court held that placing a detectaphone against an office wall in order to listen to conversations taking place in the office next door did not violate the Fourth Amendment, since the eavesdropping had not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area. In discussing *Olmstead* the court stated that no reasonable or logical distinction could be drawn between the facts in the *Goldman* case and the facts in the *Olmstead* case. The court refused to overrule *Olmstead* but adhered to the opinion there expressed.

In *On Lee v. United States,* 343 U.S. 747 (1952), a federal agent who was acquainted with the petitioner entered petitioner's laundry and engaged him in an incriminating conversation. The agent had a microphone concealed upon his person. Another agent stationed outside with a receiving set was tuned in on the conversation and at the petitioner's trial related what he had heard. These circumstances were held not to constitute a violation of the petitioner's Fourth Amendment rights since no trespass was committed and the agent went into the petitioner's place of business with the consent, if not by the implied invitation, of the petitioner. The court stated that the authority of *Gouled* is sharply limited by *Olmstead.*

In *Silverman v. United States,* 365 U. S. 505 (1961), the eavesdropping was accomplished by means of an unauthorized physical penetration of a recording device into the premises occupied by petitioner. Evidence thus obtained was held violative of the rights guaranteed by the Fourth Amendment. In that case the Supreme Court refused to review its decisions in *Olmstead, Goldman* and

On Lee but distinguished them on the ground that in those cases there had been no physical intrusion into the premises of the petitioners. The court stated at page 512:

> "We find no occasion to reexamine *Goldman* here, but we decline to go beyond it, by even a fraction of an inch."

In *Wong Sun v. United States*, 371 U. S. 471 (1963), verbal incriminating statements made by petitioner, Toy, after his arrest without a warrant and without probable cause were excluded under the inhibition of the Fourth Amendment. In that case Toy operated a laundry. About 6:00 o'clock in the morning federal agents gathered at the laundry. Other federal agents remained nearby, out of sight, when federal agent Wong, who was of Chinese ancestry, rang the bell. When Toy appeared and opened the door, agent Wong told him that he was calling for laundry and dry-cleaning. Toy replied that he didn't open until 8:00 A.M., and told the agent to come back at that time. Toy started to close the door. Agent Wong then took his badge from his pocket and said, "I am a federal narcotics agent." Toy immediately slammed the door and started running down the hallway to his living quarters in the back. Agent Wong and the other federal officers broke open the door and followed Toy into the bedroom where he was arrested. Toy's verbal, incriminating statement was obtained several days afterwards on questioning by a narcotic agent.

In *Lopez v. United States*, 373 U.S. 427 (1963), an agent of the Internal Revenue Service was investigating possible evasion of excise taxes in the area where Lopez conducted an inn. He described Lopez' inn in a report to his superiors as a "potential delinquent." On a return

visit to the inn, the agent spoke to Lopez and advised him that he thought the inn would be liable for a cabaret tax and asked to see the books. After further discussion, Lopez gave to the agent a sum of money which, from the context, was a bribe. Lopez asked the agent to return at a later date. The agent reported his meeting with Lopez to his superiors and turned over the money which he had received. The agent was then instructed to keep the appointment with Lopez, to "pretend to play along with the scheme." The agent was then equipped with two electronic devices, a pocket battery-operated transmitter, (which subsequently failed to work), and a pocket wire recorder which recorded the conversation between Lopez and the agent at his meeting later in the day. The agent suggested that they talk inside Lopez' office and thereafter Lopez engaged in some incriminating conversation while inside his office. The Supreme Court upheld the conviction of Lopez and the introduction into evidence of the agent's testimony regarding his conversations with Lopez, as well as the admissibility of the tape recording of that conversation. Lopez contended that in view of the agent's alleged falsification of his mission, he gained access to Lopez' office by misrepresentation and all evidence obtained in the office was illegally seized. At page 438 the court states:

> "[The agent] was not guilty of an unlawful invasion of petitioner's office simply because his apparent willingness to accept a bribe was not real. Compare *Wong Sun v. United States,* 371 U. S. 471. He was in the office with petitioner's consent, and while there he did not violate the privacy of the office by seizing something surreptitiously without petitioner's knowledge. Compare *Gouled v. United*

States, supra. The only evidence obtained consisted of statements made by Lopez to Davis, statements which Lopez knew full well could be used against him by Davis if he wished. We decline to hold that whenever an offer of a bribe is made in private, and the offeree does not intend to accept, that offer is a constitutionally protected communication."

In *Todisco v. United States,* 298 F. 2d 208 (9th Cir. 1961), C.D. 368 U.S. 989 (1962), appellant, an attorney at law, was representing a client in attempting to negotiate a compromise settlement of a tax liability as assessed by the tax court. In the course of negotiations, appellant made several statements to a revenue agent assuring him of rewards in the event of a favorable settlement. These overtures were reported by the agent to his superiors. Conversations referred to took place in the appellant's law office during which the agent was equipped with a Fargo device, being a miniature radio transmitter. The conversations in their entirety were transmitted and recorded at the point of reception. The upshot of these conversations was an agreement that upon the agent's acceptance of a settlement, appellant's fee was to be split between them. Appellant contended that the recording of his conversation violated the Fourth and Fifth Amendments of the United States Constitution. This court concluded that no constitutional right of appellant was violated by the manner in which the tapes were secured, or by their admission into evidence. The same result, under a similar state of facts, was reached by this court in *Carbo v. United States,* 314 F. 2d 718 (1963), C.D. 377 U.S. 953 (1964).

Other Circuit Courts of Appeal have held that evidence obtained by law enforcement officers using the

subterfuge of hiding their identity in order to pose as members of the general public is admissible. See, *United States v. Bush,* 283 F.2d 51 (6th Cir. 1960), C.D. 364 U.S. 942 (1961); *Whiting v. United States,* 321 F.2d 72 (1st Cir. 1963), C.D. 375 U.S. 884 (1963).

In addition to *Gouled v. United States, supra,* and *Wong Sun v. United States, supra,* both of which we have reviewed above, appellant cites the following Federal Court decisions which he claims also support his contentions: *United States v. Mitchneck,* 2 F. Supp. 225 (1933); *Fraternal Order of Eagles v. United States,* 57 F.2d 93 (3rd Cir. 1932); *Gatewood v. United States,* 209 F.2d 789 (D.C. Cir. 1953). We have reviewed the decisions in the cases last cited and find that the facts therein appearing clearly distinguish them from the facts in the instant case.

From our review of the decisions of the Supreme Court which we have cited, we conclude under the circumstances of this case that there was no violation of any Constitutional right upon which appellant relies. We further conclude that the conduct of the law enforcement officers was not "dirty business" or unfair in such a manner as to deprive the appellant of due process.

It appears to us that the conduct of the law enforcement officers in this case was within the permissible "artifice and strategem [which] may be employed to catch those engaged in criminal enterprises." *Sorrells v. United States,* 287 U.S. 435 (1932). See also *Sherman v. United States,* 356 U.S. 369 (1958).

Appellant's contention that the state trial court failed to pass on whether or not there was an unlawful search and seizure is without merit. On several occasions the trial court overruled appellant's objections to the admis-

sion of evidence relating to conversations and the recordings thereof. References to questions of the trial court in that connection on one such occasion concerning probable cause for arrest fall short of supporting appellant's contention that the trial court "went off on a tangent" or failed to apply proper constitutional standards in the admission of such evidence.

The remaining contentions of appellant on this appeal, in our view, are no more than attempts to procure a review in this court on questions of California law. No useful purpose would be served by setting forth such contentions in detail. Suffice it to say that appellant asserts the state court misapplied the law relating to the defense of entrapment;[3] that the court erroneously admitted hearsay evidence; that it misinterpreted the California Insurance Code; that it did not correctly apply the law of scienter; and that the District Court of Appeals for the State of California relied on a nonexistent "concession".

As stated in *United States of America ex rel. Walter Hall v. People of the State of Illinois*, 329 F.2d 354 (7th Cir. 1964) at page 359:

> "The protections embedded in due process are flexible. As society matures, they change to meet its needs and social goals. When the several states have consistently discharged their responsibility to society in giving full recognition of their constitutional obligation to prevent the prostitution of state judicial power through lawless enforcement of the criminal law, the need for federal intervention is not apparent. To hold otherwise would compel

[3]The defense was not raised in the trial court.

federal intrusion, under the guise of constitutional concern, into the daily operation of the state judicial process. We find no justification for such drastic procedure in the resolution of the case at bar."

The judgment appealed from is affirmed.

APPENDIX D.

Record References to Show Defense of Entrapment Was Raised at the Trial.

Parts of Opening Statement by Attorney for Petitioner.

R. T. p. 29:

"Now, as regards Mr. Meng, the gentleman who sits right here, Mr. Meng is an investigator for the Bureau of Investigation. He is an undercover man, and we expect to show he is a very clever investigator."

* * *

"Mr. Benson talked to Mr. Meng and he asked him specifically whether or not he had been hurt in the accident, and Mr. Meng some way avoided the issue. He didn't answer yes and he didn't answer no. He admits that himself, that he avoided the issue, and he didn't give Mr. Benson a direct answer.

"We expect to show that if Mr. Meng had given a direct answer Mr. Benson wasn't interested in representing him. Mr. Benson wasn't interested in representing people that weren't hurt in automobile accidents, and the fact that he was at a doctor's office, we expect to show, led Mr. Benson to believe that Mr. Meng had a bona fide case.

R. T. p. 31:

"—there was no accident at all, but Mr. Hawkins called in order to lead Mr. Benson on further."

R. T. p. 32:

"We expect to show that Mr Benson honestly believed the injuries claimed by Mr. Meng and Hawkins believed there had been an accident. Mr. Meng had called Mr.

Benson from Dr. Matloff's office and he believed that Meng had been injured, although Mr. Meng had called up with erratic conversation from time to time and acted like a very irresponsible person, which he is not. He acted this out in such a manner so as to completely keep Mr. Benson going along."

R. T. p. 34:

"I want you to see the cat and mouse proposition which we expect the evidence to show that Mr. Meng played with Mr. Benson, who believed and sincerely believed he had a client, and yet who was an erratic client, albeit, but he was nevertheless leading him on and on to try to get him into a position where he finally would send these claims in to the Preferred Risk Mutual Insurance Company.

Now, Mr. Meng, the minute Mr. Benson said he wouldn't be a party to a fraud, Mr. Meng immediately started backing right off from the situation, backing right off."

Cross Examination of Stewart — Insurance Adjuster in Buchholz Case.

R. T. p. 173:

Q. And the reason you called Mr. Benson was to get him to file further statements with your company, was it not?

A. That is correct, sir.

Q. And that was at the instigation of the District Attorney? You were doing what he told you then, weren't you?

A. Yes, sir.

* * *

Q. Everything else you did was simply done if we could use the word, to ensnare Mr. Benson, was it not?

A. This might be said, yes.

Cross Examination of Duffy, the Insurance Adjuster in Meng's Case.

R. T. p. 248:

Q. *Well now, you were tying in the Wittig case with the Hawkins (i.e. Meng) case; is that correct?* (The Wittig case was another case petitioner had pending with this insurance adjuster.)

A. *Correct.*

* * *

Q. *So you were tying in a legitimate transaction with one that you knew there was no basis for?*

A. *Correct.*

R. T. p. 249:

The Court: *Mr. Cantillon, this letter apparently pertains to the Wittig case. I fail to see the connection or what you are endeavoring to bring out which is relevant to this matter.*

Mr. Cantillon: Well, if your Honor please, it's true it pertains to the Wittig case.

Now, when Mr. Duffy took up his negotiations with Mr. Benson on the Meng case, he tied it right into this Wittig case, which I want to show under the particular, peculiar circumstances of this thing, would completely disarm Mr. Benson. They didn't give him any idea whatsoever, Mr. Duffy did not, that there was anything wrong with the Meng case. I want to show — my whole theory on this is Mr. Benson has been misled.

R. T. p. 250:

Mr. Cantillon: My position is that in view of the fact that he has testified that he has discussed this case with Mr. Benson that *I should have cross-examination to a limited extent and the right to go in and show what the circumstances were in that particular case, so as to show what was operating on Mr. Benson's mind.*

The Court: *Well, that I think, is irrelevant.*

On page 253, the Court stopped further cross examination and on page 254 refused to admit the Wittig letter, Defendant's A into evidence.

Further Cross Examination of Duffy by Attorney for Petitioner.

R. T. p. 255:

Q. By Mr. Cantillon: *You said, "O. K. Do you think you can sell him on the thing?"* (referring to the settlement offered in the Meng case).

Mr. Duffy, you were talking to Mr. Benson and you were asking him to do something?

A. Yes. I meant Meng, the client.

* * *

Q. *You knew that Mr. Meng was working for the District Attorney's office, and he was feigning the whole thing, did you not? A. Yes, I did.*

R. T. p. 256:

Q. *. . . did it ever occur to you that that expression — I want to ask you, did it occur that that expression* (referring to: "Do you think you can sell him, etc.") *might mislead Mr. Benson?*

A. *No.*

Part of Closing Argument by Attorney for Petitioner.

Rep. part. Tr. pp. 46-49:

"On April 19, if Your Honor please, that conversation that Mr. Meng had which is a crucial conversation in this particular case — that Mr. Meng had with Mr. Benson — *I think that was a very studied conversation.* I think Mr. Meng is a very fine investigator, very experienced investigator, and he knew just how far to go, and when he got up to the point where Mr. Benson was going to throw that case out of there, he switched on him right away. *He didn't honestly say to Mr. Benson — if he had gone in and said, "This fellow didn't treat me at all. I didn't have twenty-six treatments with him" — he didn't tell him anything like that.* He went in and said, "It's a pack of lies," and Mr. Benson started to question him on it, and then Meng became very hazy. Remember as against this background. Mr. Meng had called for Mr. Benson's services, had talked to Mr. Benson from Mr. Matloff's office — that is where the relationship originated, from a doctor's office. Mr. Benson has got that in his mind when talking to him, and here is this man coming in saying that he is not hurt and that the doctor's reports are a pack of lies, and that seemed to be the chief thing that stuck in his mind, and if you will just follow that conversation there *you can see the turning point in the whole conversation, and how clearly Mr. Meng backed up on it.* If he had said two more words, or said it once more, this case would have gone out of the office and there is no question about it in my mind, Your Honor.

Benson told him that he didn't want to participate in a fraud. He repeated that on a couple of occasions. He said he was not going to participate in a fraud, and "If

you and the doctors say it's correct, I will go along. If you say it's incorrect, well, I'll say I am not going to participate in a fraud. I never have for four years and I don't intend to. If you say this is untrue, let's forget it. You figure it out for yourself," *and Meng answers, "I don't know."*

Now, if that wouldn't tend, with the background that Mr. Benson had in that case, knowing that Meng had seen two doctors, Dr. Harder and Dr. Bucholz, knowing that Meng had come to him from the doctor's office, having no reason to question the doctor's report that is before him, with that particular background, *when Meng said that he didn't know, after Benson told him to figure it out for himself, that would completely disarm Mr. Benson. He would think the fellow was erratic, or that there was something he was upset about, and that he wasn't thinking correctly, and he would go ahead with his case. He would do the best he could with it, and that is just what Mr. Benson did.*

Now, I say if Mr. Meng had said at that time when Benson said, "You say this thing is untrue, let's forget the whole thing. You figure it out for yourself," and *if Meng had said, "It is untrue," that would have been the case right then and there.*

I don't quite get this proposition of dangling along — of just giving him — *if he had come out and given him definite knowledge — when he said that the reports were a pack of lies — if he had answered the questions and told wherein they were a pack of lies and said that he hadn't seen him twenty-six times — but he doesn't tell him that.* He says, "Where are the lies?" Then there are the telephone conversations. Every time Meng switches.

Now, that was quite a performance to stage in Mr. Benson's office, because all he had to say to Mr. Benson was, "The whole thing is untrue," and then see what Mr. Benson would have done, *but no, he says, "I don't know."*

He just dangled him along. Now, if Your Honor please, Mr. Benson has been the victim of a terrible situation here. *There has been Mr. Buchholz who was simulating and making false representations to him* — as far as he was concerned *there was Mr. Meng who was making false representations as to an accident, being at the doctor's office for treatment and all various things —- Mr. Hawkins calling him up and saying he didn't appear hurt too much or that he didn't appear too hurt.* That was it. I think that was the exact language, and Mr. Hawkins simulating that there had been an accident, and so forth.

On top of that there was Mr. Duffy, who was leading him along. Mr. Stewart, who was leading him on through these negotiations. On top of that Matloff was misleading him and misrepresenting the facts to him, and Dr. Harder was misrepresenting the facts to him.

He had seven people all misrepresenting the facts to him in one way or another in this particular case. Is it a wonder that he was misled or misguided, or didn't use the best judgment that might have been used in connection with the matter? I don't think so. Under those circumstances it would have been enough to confuse anybody."

On Motion for a New Trial Petitioner Cited Entrapment Authorities.

Cl. Tr. p. 36:

". . . after Benson declared:

' "I am not going to participate in a fraud and never have in 14 years and I don't intend to." (Rep. Tr. p. 764), and "If you say this is untrue, let's forget the whole thing, you figure it out for yourself," Meng replies, "I don't know." ' (Rep. Tr. p. 765).

Such conduct should further invoke the doctrine of estoppel referred to in

Voves v. United States, 249 Fed. Rep. 191;

United States v. Healy, 202 Fed. 349."